IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____

CLAUDE D. BALLEW,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

ROBERT EUGENE SMITH, Esq.
1409 Peachtree St., N.E.
Atlanta, Georgia 30309
Attorney for Petitioner.

Of Counsel:
MICHAEL CLUTTER, Esq.
1409 Peachtree St., N.E.
Atlantia, Georgia 30309

The Paul M. Harrod Company, Baltimore, Maryland 21234

INDEX

TABLE OF CONTENTS

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement 3

Reasons for Granting the Writ: –

I. This case presents for review an issue expressly reserved by this court in *Williams v. Florida*, 399 U.S. 78 (1970) – The minimum number of jurors required to guarantee the constitutional right to jury trial in criminal cases 4

II. The jury instructions on the issue of *scienter* failed to meet the minimum constitutional standards enunciated by this court in *Hamling v. United States*, 418 U.S. 87 (1974) 9

III. The motion picture film "Behind the Green Door" upon which petitioner's conviction rests is an artistic work of national acclaim which may not, as a matter of applicable constitutional law, be held obscene since it constitutes expression protected under the First and Fourteenth Amendments to the United States Constitution 11

Page

Conclusion 16

INDEX TO APPENDICES

Appendix A. 1

Appendix B. 8

Appendix C. 9

Appendix D. 10

TABLE OF CITIATIONS

Cases

Aday v. United States, 388 U.S. 447 (1967) 14
Baldwin v. New York, 399 U.S. 66 (1970) 5
Corinth Publications v. Westberry, 388 U.S. 448 (1967). 14
DeStefano v. Woods, 392 U.S. 631 (1968) 5
Duncan v. Louisiana, 391 U.S. 145 (1968) 4,5
Grove Press v. Gerstein, 378 U.S. 577 (1964) 14
Hamling v. U.S., 418 U.S. 87 (1974). 2,9
Hoyt v. Minnesota, 399 U.S. 524 (1970). 14
Jacobellis v. Ohio, 378 U.S. 184 (1964) 12,14
Jenkins v. Georgia, 418 U.S. 153 (1974). 14
Manual Enterprises, Inc. v. Day, 370 U.S. 478 (1962). . . . 11,12
Mazes v. Ohio, 388 U.S. 453 (1967) 14
Memoirs v. Massachusetts, 383 U.S. 413 (1966) 14
Mishkin v. New York, 383 U.S. 502 (1966) 10
Pinkus v. California, 400 U.S. 922 (1970). 15
Pinkus v. Pitchess, 429 F.2d 416 (CA 9 1970) 15
Sanders v. State, 234 Ga. 586, 216 S.E.2d 838 6
Smith v. California, 361 U.S. 147 (1959) 10
Williams v. Florida, 399 U.S. 78 (1970) 4,6,7,8,9

Page

Articles

Zeisel, The Waning of the American Jury,
58 A.B.A. Journal 367 8
Diamond, A Jury Experiment reanalyzed,
7 Mich. Journal of Law Reform 520. 8
Zeisel & Diamond, Convincing Empirical Evidence
41 Univ. of Chicago Law Review281. 8

Miscellaneous

Georgia Constitution (Georgia Code Annodated)
Article VI, Section XVI. 3
Georgia Laws 1935, Volume 2, p. 498 3
United States Constitution:
First Amendment 3,10,11,15
Sixth Amendment. 3,4,5,7
Fourteenth Amendment 3,4,10,11,15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. _____

CLAUDE D. BALLEW,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE
GEORGIA COURT OF APPEALS

The Petitioner respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Georgia Court of Appeals entered in the above case on April 6, 1976.

OPINION BELOW

The opinion of the Georgia Court of Appeals is not yet reported, but a copy thereof is set forth in Appendix A hereto.

JURISDICTION

The Judgment of the Georgia Court of Appeals was entered on April 6, 1976. An application for rehearing was timely filed and denied on May 6, 1976. Copy of said denial is set forth in Appendix B hereto. Thereafter, the Supreme Court of Georgia denied a timely filed Petition for Writ of Certiorari on July 9, 1976. Copy of said denial is set forth herein in Appendix C. Mr. Justice Powell granted an extension of time to and including December 6, 1976 within which to file this Petition. The Court's jurisdiction is invoked under Title 28 United States Code §1257(3).

QUESTIONS PRESENTED

1. Whether a jury comprised of five persons is sufficient to afford to an accused in a criminal prosecution the right to trial by jury granted by the Sixth and Fourteenth Amendments to the United States Constitution?

2. Whether jury instructions on *scienter* allowing a finding of "constructive knowledge" in an obscenity case are sufficient to meet the constitutional minimum standards of *scienter* set forth in *Hamling v. United States*, 418 U.S. 87 (1974)?

3. Whether the motion picture film "Behind the Green Door" can, as a matter of law, be held obscene or whether it constitutes speech protected by the First and Fourth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First, Sixth, and Fourteenth Amendments to the United States Constitution, as well as Article VI, Section XVI of the Georgia Constitution (Georgia Code Annotated §2-5101) and an Act Establishing the Criminal Courts of Atlanta (Georgia Laws 1890-91, Volume 2, p. 935, as amended by Georgia Laws 1935, Volume 2, p. 498) are set forth in Appendix D hereto.

STATEMENT

Petitioner was convicted in the Criminal Court of Fulton County on two counts of distributing obscene materials, the charges being predicated upon two exhibitions of the motion picture film "Behind the Green Door" at the Paris Art Theatre in Atlanta, Georgia. Petitioner was alleged to have been an employee of the theatre at the time the film was exhibited.

Prior to his trial, Petitioner filed several motions in the Criminal Court of Fulton County, including a Motion to Impanel a Twelve-Person Jury in the Superior Court of Fulton County, alleging that the five-person juries provided in the Criminal Court of Fulton County are unconstitutional. All of Petitioner's motions were denied.

Petitioner was then tried before a five-person jury in the Criminal Court of Fulton County and found guilty on both counts. He thereafter appealed his conviction to the Georgia Court of Appeals which affirmed the trial judgment in all respects in a judgment and opinion for which review is sought by this Petition.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS FOR REVIEW AN ISSUE EXPRESSLY RESERVED BY THIS COURT IN *WILLIAMS V. FLORIDA*, 399 U.S. 78 (1970) – THE MINIMUM NUMBER OF JURORS REQUIRED TO GUARANTEE THE CONSTITUTIONAL RIGHT TO JURY TRIAL IN CRIMINAL CASES.

The as yet undecided status of the issue here presented for review – the minimum number of jurors necessary to guarantee the constitutional right to a trial by jury in criminal matter – was explicitly recognized in *Williams v. Florida*, 399 U.S. 78 (1970). The *Williams* case presented two issues of major import, one of them dealing with the Sixth Amendment right to jury trials as applied to the States through the Fourteenth Amendment.

Williams was convicted of robbery in a Florida State Court, his judgment of conviction being predicated upon a verdict of guilty returned by a six-person jury. Prior to his trial, Williams had sought to empanel a twelve-person jury, challenging the Florida State statute which provides for six person juries in all but capital cases. His motion was denied and the issue of the constitutionality of juries comprised of less than twelve persons was therefore presented in this Court.

The Court first of all noted that the Sixth Amendment right to trial by jury in criminal cases had been made applicable to the States through the Fourteenth Amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968). It was noted that, pursuant to

Duncan, the Fourteenth Amendment guarantees an accused in state criminal trials the right to a jury in all cases which would invoke such a right if tried in federal court. Williams' robbery trial clearly fell within the scope of the *Duncan* holding. See *Baldwin v. New York*, 399 U.S. 66 (1970) and *De Stefano v. Woods*, 392 U.S. 631 (1968).

Having noted that the Sixth Amendment right to jury trial in criminal matters was thus applicable, this Court went on to decide whether that concept of "trial by jury" necessarily required a state jury of twelve persons:

> "The question in this case then is whether the constitutional guarantee of a trial by 'jury' necessarily requires trial by exactly 12 persons, rather than some lesser number – in this case, 6." 399 U.S., at 86.

The Court rejected the Petitioner's contention and held that, in order to adequately guarantee the constitutional right to jury trial in criminal matters, States need not provide for juries of exactly twelve persons:

> "We hold that the 12-man panel is not a necessary ingredient of 'trial by jury,' and that respondent's refusal to empanel more than 6 members provided for by Florida law did not violate petitioner's Sixth Amendment rights as applied to the States through the Fourteenth." *Id.*

In thus deciding that a twelve-person jury is not constitutionally mandated, however, this Court did not determine what minimum number would be required to guarantee this Sixth Amendment right. Indeed, that question was expressly reserved:

> "We have no occasion in this case to determine what minimum member can still constitute a 'jury,' but we do not doubt that 6 is above that minimum." 399 U.S., at 91 n.28.

The fact that the question was left unresolved in *Williams* was expressly noted by the Georgia Court of Appeals in rejecting Petitioner's argument in this case. The failure of this Court to determine what minimum number can still constitute a "jury" was cited below as, *inter alia*, the justification for rejection of Petitioner's argument at the State level:

> "The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In Williams v. Florida, 399 U.S. 78, 92, 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446 (Fn. 28) it is observed 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five-man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts." *Ballew v. State*, ____ Ga. App. ____, ____ S.E.2d ____, quoting *Sanders v. State*, 234 Ga. 586, 216 S.E.2d 838.

The instant Petition squarely presents the issue for final resolution by this Court. Whatever the outcome, it is respectfully submitted that the open-ended uncertainty precipitated by the *Williams* footnote should be eliminated. As was noted by Mr. Justice Harlan in *Williams*, *supra*:

> "The court's elaboration of what is required provides no standard and vexes the meaning of the right to a jury trial in federal courts, as well as state courts, by uncertainty . . . . The uncertainty that will henceforth plague the meaning of trial by jury is itself a further sufficient reason for not hoisting the anchor to history." 399 U.S., at 126.

It is also necessary to delineate the minimum number required to safeguard the Sixth Amendment guarantee of trial by jury in order to eliminate the "slipper slope" recognized by the Court in *Williams*, *supra*:

> "The *Thompson* opinion also reasoned that if a jury can be reduced from 12 to eight, then there was nothing to prevent its similarly being reduced to four or two or even zero, thus dispensing with the jury altogether. See 170 US at 353, 42 L Ed at 1067. That bit of logic, resurrected today in Mr. Justice Harlan's concurring opinion, post, at 126, 26 L Ed 2d at 468, suffers somewhat as soon as one recognizes that he can get off the slippery slope before he reaches the bottom." 399 U.S., at 91 n.28.

When viewed in light of the purposes of the jury trial right, it cannot be doubted that the jury of five provided for the Petitioner in this case was insufficient. It has been recognized that among the purposes of a jury trial in criminal matters is that of interposing members of the community between corrupt or overzealous prosecutors and compliant judges:

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." 391 U.S., at 156.

This purpose was expounded upon by this Court in *Williams* which noted that the jury also serves the purpose of providing the common sense judgment of the community:

> "[T]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence." 399 U.S., at 99.

The Court in *Williams*, although failing to reach the issue of the required minimum, did enunciate the principles to be applied in that determination:

> "[T]he number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross section of the community." *Id.*

When judged against these criteria, the five-person jury provided by the Georgia statute here under review must be found wanting. Statistical studies subsequent to the *Williams* decision have adequately established that smaller juries are significantly less representative of minority positions. *See, e.g.*, Zeisel, *The Waning of the American Jury*, 58 A.B.A. Journal 367; Diamond, *A Jury Experiment Reanalyzed*, 7 Mich. Journal of Law Reform 520; Zeisel and Diamond, *Convincing Empirical Evidence*, 41 University of Chicago Law Review 281.

If the purpose of a jury is to interpose the conscious of the community between the prosecutor and a compliant judge, a broad cross-section must be afforded in order to assure that the compliant judge is not merely replaced by a single compliant juror with the ability to determine guilt or innocence.

Group deliberation and group dynamics necessitate at least the six-person minimum found constitutionally acceptable in *Williams*.

II.

THE JURY INSTRUCTIONS ON THE ISSUE OF *SCIENTER* FAILED TO MEET THE MINIMUM CONSTITUTIONAL STANDARDS ENUNCIATED BY THIS COURT IN *HAMLING V. UNITED STATES*, 418 U.S. 87 (1974).

The jury which tried Petitioner instructed in an improper manner upon the issue of *scienter* or knowledge on the part of the Petitioner. As to the issue of knowledge, the jury was instructed as follows:

> "[T]he word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene content of the subject matter. And a person has constructive knowledge of the obscene content if he has the knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material."

The instruction to return a verdict of guilty upon a finding of "constructive knowledge" is patently erroneous when the current constitutional minimum standards of *scienter* are considered. The most recent decision of this Court on the requirements of *scienter* is *Hamling v. United States*, 418 U.S. 87 (1974). There, the Court states:

> "We think the 'knowingly' language of 18 U.S.C. § 1461 and the instructions given by the district court in this case satisfy the constitutional requirements of

> scienter. It is constitutionally sufficient that the prosecution show that the defendant had knowledge of the contents of material he distributes, and that he knew the character and nature of the materials."

As the above decision clearly demonstrates, the Constitution requires a finding of actual rather than constructive knowledge. The requirement of actual knowledge is necessary to eliminate the chilling effect which will flow from any lesser standard. *Smith v. California*, 36' U.S. 147 (1959). As the Court stated in *Mishkin v. New York*, 383 U.S. 502 (1966):

> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent to the definition of obscenity."

• The present constitutional minimum standard of *scienter* clearly requires actual knowledge. The trial Court erroneously instructed the jury that a finding of guilty could be predicated upon constructive knowledge.

The Court of Appeals rejected Petitioner's argument in this regard by noting that the instruction is in accordance with Georgia statutes. This overlooks the fact that the argument is constitutionally based and that a statute may not authorize that which the Constitution forbids. Petitioner's argument in this regard is predicated upon rights derived from the First and Fourteenth Amendments to the United States Constitution. Since these rights may not be abrogated by any state statute, reliance upon the authorization of the statute does not answer Petitioner's constitutional objections.

The present constitutional minimum standards of *scienter* clearly require actual knowledge. The trial Court erroneously instructed the jury that a finding of guilty could be predicated upon constructive knowledge as well as actual knowledge. Petitioner's conviction must, therefore, be reversed.

III.

THE MOTION PICTURE FILM "BEHIND THE GREEN DOOR" UPON WHICH PETITIONER'S CONVICTION RESTS IS AN ARTISTIC WORK OF NATIONAL ACCLAIM WHICH MAY NOT, AS A MATTER OF APPLICABLE CONSTITUTIONAL LAW, BE HELD OBSCENE SINCE IT CONSTITUTES EXPRESSION PROTECTED UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court is respectfully requested to independently review the alleged obscenity of the motion picture film upon which Petitioner's conviction is predicated. The doctrine necessitating an independent appellate review of the alleged obscenity of materials found obscene at the trial level had its origins in this Court's decision in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962). That case involved action by a local postmaster in withholding delivery of certain magazines after finding them obscene. The publishers who had mailed the magazines brought suit in the United States District Court seeking injunctive relief, but their complaint was dismissed without opinion. The Court of Appeals affirmed the dismissal, holding that the evidence supported the administrative findings that the magazines were obscene and thus non-mailable matter. This Court reversed in a judgment announced by Mr. Justice Harlan.

The Court thought the dispositive question to be whether or not the magazines were in fact obscene. 370 U.S., at 488. On this issue, the Court noted that the determination below had been made under improper assumptions as to the law of obscenity. The Court, however, decided against remanding the case for an initial determination of the obscenity issue below:

> "Whether this question [of obscenity] be deemed one of fact or of mixed fact and law, see Lockhart and McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn L Rev 5, 114-115 (1960), we see no need of remanding the case for initial consideration by the Post Office Department or the Court of Appeals of this missing factor in their determinations." 370 U.S., at 488.

The Court decided that the determination of that issue must ultimately rest with it:

> "That issue, involving factual matters entangled in a constitutional claim, see Grove Press, Inc. v. Christenberry (CA 2 NY) 276 F2d 433, 436, is ultimately one for this Court. The relevant materials being before us, we determine the issue for ourselves." *Id.*

The doctrine of independent review was again invoked by this Court in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). *Jacobellis* involved a conviction of a Cleveland, Ohio motion picture theatre operator for possessing and exhibiting the film "The Lovers." On appeal, this Court reversed in a judgment announced by Mr. Justice Brennan. On the issue of independent review, Mr. Justice Brennan, relying in part upon *Manual Enterprises, Inc. v. Day, supra*, states:

> "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See Roth v. United States, supra, 354 US, at 497-498, 1 L ed 2d at 1541, 1515 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., at 498, 1 L ed 2d at 1514; see Manual Enterprises, Inc. v. Day, 370 US 478, 488, 8 L ed 2d 639, 647, 82 S Ct 1432 (opinion of Harlan, J.)." 378 U.S., at 188.

It was noted that the duty of appellate review is not a pleasant one, but it was held to be one which must be exercised:

> "We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with this Court exercising only a limited review such as that needed to determine whether the ruling below is supported by "sufficient evidence." The suggestion is appealing, since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be unconsistent with our duty to uphold the constitutional guarantees." 378 U.S., at 187-188.

Mr. Justice Brennan, in an opinion joined by Mr. Justice Goldberg, went on to conclude that reversal was necessary since the film "The Lovers" was not obscene. This conclusion as to the film was concurred in by Mr. Justice Stewart.

The continuing validity of the *Jacobellis* doctrine and of the appellate duty it imposes was affirmed by this Court only recently in the case of *Jenkins v. Georgia*, 418 U.S. 153 (1974). That case involved a conviction under a state obscenity statute founded upon the exhibition of the film "Carnal Knowledge." This Court reversed the conviction based upon its own viewing of the film, and the finding that the film could not, as a matter of constitutional law, be held obscene.

The Court is respectfully called upon to perform the judicial duty above delineated and thus to determine the obscenity *vel non* of the nationally acclaimed motion picture film "Behind the Green Door" upon which Petitioner's conviction rests.

In any independent review, the past findings of this Court on the sole issue of obscenity have obvious bearing. In this respect it is important to note that findings of obscenity have been reversed by this Court as to press materials devoted entirely to explicit depictions or descriptions of sexual activities, including detailed and vernacular descriptions reaching the ultimate in explicitness as to heterosexual intercourse, masturbation, beastiality, oral-genital intercourse, sado-masochism, and homosexual activity. *See, e.g., Memoirs v. Massachusetts*, 383 U.S. 413 (1966) ("Fanny Hill"); *Aday v. United States*, 388 U.S. 447 (1967) ("Sex Life of a Cop" described at 357 F.2d 855); *Corinth Publications v. Westberry*, 388 U.S. 448 (1967) ("Sin Whisper" described at 146 S.E.2d 764); *Mazes v. Ohio*, 388 U.S. 453 (1967) ("Orgy Club"); *Hoyt v. Minnesota*, 399 U.S. 524 (1970) ("The Way of a Man with a Maid," "Lady Susan's Cruise Lover," and three other books); *Grove Press v. Gerstein*, 378 U.S. 577 (1964) ("Tropic of Cancer").

In the area of motion picture films, this Court has reversed findings of obscenity as to films which depict totally nude women; films which depict nude and partially nude men and women engaged in sexual gyrations, simulated intercourse, and simulated oral-genital contact, all emphasizing pubic and rectal area; and films depicting lesbian sexual activity and hetero-sexual activity between men and women. Moreover, this Court has affirmed a reversal by the Ninth Circuit Court of Appeals of a finding of obscenity as to a "stag film depicting a nude woman masturbating, with emphasis on the female genitalia and sexual gyrations." *Pinkus v. Pitchess*, 429 F.2d 416 (CA 9 1970), *affirmed sub nom. Pinkus v. California*, 400 U.S. 922 (1970).

When the nationally acclaimed motion picture film "Behind the Green Door" is considered as a whole and judged against press materials of a similar or more explicit nature heretofore determined by this Court not to be obscene, the conclusion is inescapable that the film constitutes protected speech under the First and Fourteenth Amendments to the Constitution of the United States. It should be so held and Petitioner's conviction should thus be reversed.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Georgia Court of Appeals.

Respectfully submitted,

ROBERT EUGENE SMITH, Esq.
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

Attorney for Petitioner.

Of Counsel:

MICHAEL CLUTTER, Esq.,
1409 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 892-8890

APPENDIX "A"

51795. BALLEW (C. D.) v. THE STATE. W–33

WEBB, Judge.

Claude Ballew appeals his conviction on two counts of distributing obscene materials in violation of Criminal Code § 26–2101. The conviction involved the exhibitions on November 9 and 26, 1973 at an Atlanta theatre of motion picture films entitled "Behind the Green Door." Ballew enumerates thirteen alleged errors, consolidated on argument into six issues.

1. The first is that the film is not obscene under applicable constitutional law. We were requested to make an independent appellate review of the film and make our own determination of obscenity *vel non*.

Our Constitution provides that both of our appellate courts are"for the trial and correction of errors of law . . ." Art. VI, Sec. II, Pars. IV and VIII (Code Ann. §§ 2-3704, 3708). There is no constitutional provision for an independent appellate determination of the weight of evidence, and it seems to have been well settled that the appellate court's review as to evidence is limited to its legal sufficiency, not its weight. *Proctor v. State*, 235 Ga. 720, 721 (221 SE.2d 413); *Ridley v. State*, Ga. (SE.2d) (#30426, Feb 2, 1976). Even so, our Supreme Court has made de novo independent reviews of movie films to decide the constitutional fact of obscenity without reference to the "trial and correction of errors of law" constitutional limitation. *Slaton v. Paris Adult Theatre I*, 231 Ga. 312, 318 (201 SE.2d 456, 413 U.S. 49, 93 SC 2628, 37 LE2d 446), *Dyke v. State*, 232 Ga. 817 (209 SE.2d 166) (cert. denied by U.S. Supreme Court April 28, 1975).

Our view has been that we are limited to a determination of whether there was sufficient evidence to support the jury's verdict. The Supreme Court of the United States held, however, that on appeal in an obscenity case the appellate court cannot merely decide whether there was sufficient evidence to support a finding by the jury that the material is obscene, but must review independently the constitutional fact of obscenity and make a determination of such *vel non*. *Miller v. California*, 413 U. S. 15, 25 (93 SC 2607, 37 LE.2d 419); *Jenkins v. Georgia*, 418 U.S. 153, 160 (6) 164 (94 SC 2750, 41 LE.2d 642, 650, 652). That Court held that juries do not have unbridled discretion in determining what is patently offensive, and the jury's verdict does not preclude all further appellate review of an accused's assertion that his film was protected by the First and Fourteenth Amendments.

This issue of independent review had been invoked earlier in *Jacobellis v. Ohio*, 378 U.S. 184, 188 (84 SC 1676, 12 LE.2d 793, 798) wherein Mr. Justice Brennan stated: "Since it is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law [cit. omitted]. Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' "

Mr. Justice Brennan also said that failure to independently review would be "an abnegation of judicial supervision. . . inconsistent with our duty to uphold the constitutional guarantee."

Our own Supreme Court stated in *Dyke v. State*, 232 Ga. 817, 821, supra: "We are not bound to approve the jury's finding that this film is obscene, since it is clear the United States Supreme Court has determined that an independent appellate review must be made of the material to decide the constitutional fact of obscenity."

Our duty to uphold the constitutional guarantees is no less than that of the justices of the respective supreme courts of the United States and of this State, and although we abhor even the suggestion of censorship we nevertheless viewed an exhibition of this film in its entirety. Our purpose was two-fold; to determine if there was sufficient evidence to support the verdict; and, in accordance with the decisions of those courts cited hereinabove (which in our opinion exceed our constitutional appellate review limitation) to decide by an independent appellate review the constitutional fact of obscenity vel non. "[T]here comes a point where this Court should not be ignorant as judges of what we know as men."[1]

Section 26–2101(b) of the Criminal Code in effect at the time of the violations[2] provided: "Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters."

The film, considered as a whole, and applying contemporary community standards, predominantly appeals to the prurient interest. It is without redeeming social value, and it is a shameful and morbid exhibition of nudity with particular and all-encompassing emphasis on sexual acts. It goes substantially beyond customary limits of candor in representing and portraying nudity and sex. The film presents patently

---

[1] Mr. Justice Frankfurter in *Watts v. Indiana*, 338 U.S. 49, 52, SC , 93 LE 1801, 1805. See *Bryon v. Felker*, Ga. App. (SE) (No. 51675, decided Jan. 28, 1976).

[2] The law was amended in 1975 and broadens somewhat the definition of obscene materials. Ga. L. 1975, p. 498.

offensive exhibitions and representations of ultimate sexual acts and manipulations, normal and perverted. It shows unabashedly offensive and lewd views of the genitals of both male and female participants, and is replete with portrayals of individual and group acts of masturbation, cunnilingus, fellstio and sexual intercourse. It is degrading to sex. Except for the opening and a few other scenes toward the conclusion, it is rank, hard core pornography, and each exhibition in the theatre was "a public portrayal of hard core sexual conduct for its own sake, and [presumably] for the ensuing commercial gain." *Miller v. California*, 413 U.S. 15, 35 supra. The film "Behind the Green Door" is obscene as a matter of constitutional law and fact, and is unprotected by the First and Fourteenth Amendments. *Miller v. California*, 413 U.S. 15, 23, supra; see also, *Liles v. Oregon*, 543 P.2d 698, 44 LW 3623 (cert. den. by United States Supreme Court May 3, 1976, 75–983).

2. Ballew's second contention is that the evidence was insufficient to support the verdict. We do not agree.

The film, obviously, is the best evidence of what it represents, and having been before the trial court no other affirmative evidence is necessary to determine its obscenity *vel non*. Examining the record and viewing a projection of the film, we conclude that the jury's determination that the picture was obscene was supported by the evidence. *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 56, supra; *Hamling v. United States*, 418 U.S. 87, 100, 94 SC 2887, 41 LE.2d 590, 610. "Sex and nudity may not be exploited without limit by films or picutres exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places." *Miller v. California*, 413 U.S. 15, 25, supra.

Ballew asserts, however, that the evidence was insufficient to connect him, beyond a reasonable doubt, with the exhibition of this film, " Behind the Green Door." The theatre he managed

was an "adult theatre, and the film was advertised on the marquee. He was present when the film was exhibited on the dates of his arrest. On at least one of the occasions involved herein he sold tickets, and pressed a button to allow entrance into the seating area. He checked the cash register and locked the door after each arrest.

In *Dyke v. Georgia*, 232 Ga. 817, 822, supra, "Appellant furhter argues the evidence is legally insufficient to sustain his conviction for exhibition of this film because it failed to show he had control over the showing of the film or knowledge of its content. The evidence shows that the film was advertised on the marquee of the theatre managed by appellant and that the threatre was an 'adult theatre.' Appellant was shown to be on the premises when the film was exhibited on the two separate dates charged in the accusation and, on the second occassion, appellant sold tickets for admission to see it. This was sufficient for the jury to conclude that on each occasion appellant at least aided and abetted in the exhibition of the film. See Code Ann. § 26–801."

We also reject Ballew's assertion that the evidence failed to prove guilty knowledge by him of the nature of the film. Under Criminal Code § 26–2101(a) "knowing" as used therein "shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject–matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." See *Dyke v. State*, at page 822, and cases cited.

3. The next argument is that the trial judge improperly instructed the jury as to the law so as to deny him his constitutional rights guaranteed by the First, Fifth and Fourteenth Amendments. An examination of the various charges complained of, however, reveals that they as a whole comport with Criminal Code § 26–2101, and those approved in *Dyke v. State*, 232 Ga. 817, supra, and *Slaton v. Paris Adult Theatre I*,

231 Ga. 312 supra. One charge complained of was a quotation of the definition of obscene material as set forth in § 26–2101. There is no merit in this complaint.

4. Error is charged on the Court's denial of Ballew's motion to supress the motion picture film because the search warrants were issued upon affidavits allegedly insufficient to supply probable cause. This same contention was made in *Dyke v. Georgia*, 232 Ga. 817, 823, 824, supra. The affidavits upon which the two search warrants were issued herein contain rather accurate and full factual descriptions of representative scenes on the film, and were sufficient to show probable cause for issuance of the warrants.

5. Ballew contends his conviction on two counts in the accusation were but a single transaction and his conviction thereon violated his constitutional rights against double jeopardy as guaranteed by the Fifth Amendment and the Georgia Constitution. Interestingly, this same argument was made in *Dyke v. Georgia*, 232 Ga. 817, 827, supra, counsel for Ballew having been counsel for Dyke.

Here, the accused was first arrested for showing the film on November 9, and the film was seized under the search warrant. The accused waived commitment hearing. Subsequently, the accused was arrested on another warrant for showing the same picture, from another copy of the film, on November 26. The statement of Mr. Justice Ingram in the *Dyke* case (232 Ga. at pages 827, 828) is equally applicable here. "Appellant argues that the accusation charged him in two counts of violating the same statute and that the proof involved a regularly scheduled showing of a motion picture in a theatre with no disruption in scheduling. The exhibition of the film on two separate dates, appellant argues, does not permit the state to 'pyramid' the charges and punishment against him. . . but that is not the case here. There were two distinct episodes involving different dates of exhibition and even different copies of the same film. This record shows two criminal violations, not a single crime." So it is in this case.

6. Lastly, appellant complains that he was denied his right to jury trial under the Sixth and Fourteenth Amendments by being tried before a five–person jury in the Criminal Court of Fulton County.

This contention was ruled upon in *Sanders v. State*, 234 Ga. 586 (216 SE.2d 838) (cert. denied by U.S. Supreme Court Feb. 23, 2976) wherein the Supreme Court said: "We reject this argument in view of Gerogia authority to the contrary. See *McIntyre v. State*, 190 Ga. 872 (5) (11 SE.2d 5). The Supreme Court of the United States has not determined what minimum number of jurors can still constitute a 'jury.' In *Williams v. Flordia*, 399 U.S. 78, 92 (Fn. 28) it is observed: 'We have no occasion in this case to determine what minimum number can still constitute a "jury," but we do not doubt that six is above that minimum.' Absent a holding by the United States Supreme Court that a five–man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts."

We find no error and affirm the trial court. Deen, P. J., and Quillian, J., concur.

APPENDIX "B"

GEORGIA COURT OF APPEALS

May 6, 1976

51795. BALLEW (C. D.) V. THE STATE W–33

Please substitute the attached new page 7 for that previously furnished in the opinion rendered in the above case on April 6, 1976. The judgement is not affected and the motion for rehearing is denied.

APPENDIX "C"

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta July 9, 1976

Dear Sir;

Case No. 31362 *Claude Davis Ballew v. The State.*

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

APPENDIX "D"

Constitutional and Statutory Provisions

1. The pertinent provisions of the First Amendment are:

   "Congress shall make no law . . . abridging the freedom of speech, or the press . . . "

2. The pertinent provisions of the Sixth Amendment are:

   "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . "

3. The pertinent provisions of the Fourteenth Amendment are:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Article VI, Section XVI of the Georgia Constitution *(Georgia Code Annotated § 2–5101)* provides:

   "The right of trial by jury except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the superior court."

States has not determined what minimum number of jurors can still constitute a "jury." In *Williams v. Flordia*, 399 U.S. 78, 92, 90 S.Ct. 1893, 1901, 26 L.Ed.2d 446 (Fn.28) it is observed "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum." Absent a holding by the United States Supreme Court that a five–man jury is constitutionally inadequate, we approve the constitutional minimum of five prescribed by the 1945 Constitution of Georgia for all courts except superior courts.

We find no error for any reason enumerated and argued in this appeal and affirm the trial court. See *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (cert. denied by U.S. Supreme Court April 28, 1975).

Judgement affirmed.

All the Justices concur, except GUNTHER, J., who concurs in the judgment only.
